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**IN THE SUPREME COURT OF THE UNITED STATES.**
**October Term, 1953.**

**No. _____**

**INVESTORS ROYALTY COMPANY, INC., a Delaware Corporation, *Petitioner,***

**vs.**

**MARKET TREND SURVEY, INC., a Corporation, A. CLIFTON STEWART, and JOHN DOE, whose true name is unknown, *Respondents.***

**PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.**

*To the Honorable Supreme Court of the United States:*

Your petitioner respectfully shows:

**I. Statement of Case.**

On May 6, 1952, petitioner, Investors Royalty Company, Inc., a Delaware corporation, domesticated in the State of Oklahoma with its principal place of business at Tulsa, Oklahoma, filed in the District Court of Tulsa County, Oklahoma, its petition against the Market Trend Survey, Inc., a corporation, A. Clifton Stewart, and John Doe, whose true name is unknown, praying for injunction against said de-

fendants (R. 3-12) enjoining them from committing certain tortious acts.

Summons was immediately issued (R. 12) and served upon defendants, which service was later held defective.

On May 9, 1952, amendment to the petition was filed asking damages for tortiously circulating among the plaintiff's stockholders and the general public letters and pamphlets containing false, misleading and untrue statements which forced the plaintiff to expend large sums of money to counteract said false, misleading and fraudulent statements and alleging that said actions were wilful and malicious and asking for actual and exemplary damages (R. 12-14).

On the date of filing the amendment to petition on May 9, 1952, an affidavit for attachment was filed on the ground that defendant "Fraudulently incurred the liability or obligation for which suit is about to be or has been brought." (R. 15) (Being the ninth ground of attachment set forth in Sec. 1151, Title 12, Oklahoma Statutes 1951.)

On the 9th day of May, 1953, upon the filing of the affidavit the clerk of the court of Tulsa County, Oklahoma, issued an order of attachment (R. 15) and the sheriff levied upon certain shares of stock of A. Clifton Stewart and Margaret A. Stewart and made his return. (R. 15-17)

On May 29, 1952, A. Clifton Stewart and Margaret A. Stewart and Market Trend Survey, Inc., filed a petition for removal of said cause to the United States District Court for the Northern District of Oklahoma upon the grounds that they and each of them were non-residents of the state (R. 1-3), and said cause was removed (R. 17).

After removal A. Clifton Stewart and Mrs. A. Clifton Stewart and Market Trend on June 2, 1952, entered a spe-

cial appearance and motion to quash the personal service of summons. No attack was made upon the attachment proceedings. The court sustained said motion to quash the summons and ordered that alias service of process might issue (R. 17-18).

On June 11, 1952, the clerk of the United States District Court for Northern District of Oklahoma issued notice to defendants which was published on July 14, 1952 (R. 20-21). On July 21, 1952, the defendants A. Clifton Stewart and Margaret A. Stewart, whose property had been attached filed their special appearance and motion to quash service of process by publication. No attack was made upon the sufficiency or irregularity of the attachment proceedings (R. 21-22).

On November 14, 1952, the United States District Court for the Northern District of Oklahoma upon hearing entered certain findings of fact and conclusions of law. The sixth conclusion being "12 Oklahoma Statutes, 1951, Sub-division 9, furnishes no ground for the attachment issued herein, since plaintiff's cause of action sounds in tort, and the statute is limited to actions *ex contractu.*" (R. 23-25) And held the attachment void and would not authorize service of process by publication and quashed said service.

On appeal the Circuit Court of Appeals for the 10th Circuit affirmed the judgment of the District Court on the specific ground that although attachment under the above statute was authorized in certain tort actions it was not authorized in the tort action set forth in plaintiff's petition. (R. 37-41)

**II. Reasons Urged for Allowance of Writ.**

(*a*) The Circuit Court of Appeals of the 10th Circuit in holding the right of attachment under Sub-division 9 of Sec. 1151, Title 12, O. S. A. 1951, is limited to certain tort actions has thereby placed a construction upon said statute directly and irreconcilably in conflict with the decisions of the Supreme Court of Oklahoma in *Kidd* v. *Syfert*, 11 Okl. 32, 61 Pac. 931; *Hendrickson* v. *Brown*, 11 Okl. 41, 65 Pac. 935, which hold, if the action is one for the recovery of money, and any ground of attachment exists, except the first, the character of the action is immaterial, which holding has been followed by the bench and bar of Oklahoma for 50 years, and the decision of the court below has thrown the well established law of Oklahoma relating to attachment into utter complete chaos and confusion.

(*b*) The decision of the lower court holding the attachment proceedings based on the affidavit for attachment in the language of the statute void is in direct conflict with the decision of the Supreme Court of Oklahoma in *Thwing* v. *Winkler*, 13 Okl. 645, 75 Pac. 1126, and the Supreme Court of the United States in *Central Loan and Trust Company* v. *Campbell Commission Company*, 173 U. S. 84, 19 S. Ct. 346, 43 L. ed. 623.

(*c*) The decision of the lower court is in direct and irreconcilable conflict with the construction the Supreme Court of Kansas placed upon said statute prior to its adoption by Oklahoma Territory in *Treadway* v. *Ryan*, 3 Kan. 437.

(*d*) The decision of the Circuit Court of Appeals is in conflict with the former opinions of this Court holding in matters of local law the law of the state as determined by

its legislature in a statute and by its highest courts are controlling.

(*e*) The court below erred in relying upon decisions from other jurisdictions construing statutes not identical.

(*f*) The decision of the lower court is in apparent conflict with the opinion in *Shedd* v. *Calumet Construction Company*, 7th Circuit, 270 Fed. 942, construing the similar Indiana statute.

*Wherefore*, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and the proceedings of said Circuit Court had in the case entitled, "Investors Royalty Company, Inc., Appellant, *vs.* Market Trend Survey, Inc., a corporation, A. Clifton Stewart, and John Doe whose true name is unknown, Appellees," being Cause No. 4585 on the docket of said court, to the end that the same be reviewed by this court as provided by the Statutes of the United States, and that the judgment of said Circuit Court be reversed by this court, and for such further relief as to this court may seem proper.

Dated the 18th day of September, 1953.

INVESTORS ROYALTY COMPANY, INC.,
*Petitioner*,
By NEAL E. MCNEILL,
*Counsel for Petitioner.*

ROGER DELL,
NEAL E. MCNEILL, JR.,
*Of Counsel.*

## BRIEF IN SUPPORT OF FOREGOING PETITION.

### I. Orders and Opinions Below.

The order sustaining motion to quash service by publication and the findings of fact and conclusions of law made therewith is found at pages 23-25 of the record and the opinion of the Circuit Court at pages 37-41. The latter opinion is not yet officially reported.

### II. Jurisdiction.

The date of the judgment to be reviewed is June 23, 1953 (see R. 41), and petition for rehearing denied August 3, 1953, when said judgment became final (R. 6) and is reviewable under Sec. 1254, Title 28, United States Code, Judiciary and Judicial Procedure, and Rule 38 of Federal Court Rules.

### ARGUMENT.

***(A)* The decision of the court below construing Section 1151, Title 12, Oklahoma Statutes 1951, conflicts with decisions of the Oklahoma Supreme Court construing said statute.**

Sec. 1151, Title 12, Oklahoma Statutes 1951, copied in full and attached hereto as Appendix "A" reads in part as follows :

> "*Grounds for Attachment.* The plaintiff in a civil action for the recovery of money may, at or after the commencement thereof, have an attachment against the property of the defendant, and upon the grounds herein stated:
>
> "1. When the defendant or one of several defendants, is a foreign corporation, or a non-resident of this State, (but no order of attachment shall be issued on

the ground or grounds in this clause stated for any claim other than a debt or demand arising upon contract, judgment or decree unless the cause of action arose wholly within the limits of this State, which fact must be established on the trial):

* * * * * * * *

"9. Fraudulently contracted the debt, or fraudulently incurred the liability or obligations for which the suit is about to be or has been brought."

The court below in construing the ninth ground of attachment set forth in Sec. 1151, *supra*, squarely held, the right of attachment under said ground was limited to certain character of tort actions but did not embrace the character of tort action set forth in petitioner's petition to recover damages based upon the defendants' conspiring and committing certain wilful, fraudulent and malicious acts and causing petitioner to expend large sums of money to counteract malicious statements and propaganda among its 3500 stockholders (R. 3-14).

The court below quashed the service of summons by publication upon the sole ground the attachment procured was unauthorized under the facts set forth in the petition and void (R. 37-41).

The above holding that an attachment procured under the ninth ground of Sec. 1151, *supra*, is limited to certain character of tort actions is in direct conflict with the decisions of the Supreme Court of Oklahoma in *Kidd* v. *Syfert*, 11 Okl. 32, 65 Pac. 931; *Hendrickson* v. *Brown*, 11 Okl. 41, 65 Pac. 935.

In *Kidd* v. *Syfert*, 11 Okl. 32, *supra*, (decided 1901), the action sounded in tort for negligently destroying property by fire and an attachment procured upon the first ground of the statute, to-wit, "defendant was a non-resident

of the state." The trial court discharged the attachment upon the sole ground "attachment is not authorized in an action *ex delicto* against a non-resident defendant."

The Supreme Court on appeal recognized the general rule that in the absence of statutory enactment no attachment could be had in action for damages arising from tort. In holding Section 1151, Oklahoma Statutes, *supra*, was sufficiently broad to include actions for damages arising from tort, the Court in comparing the Oklahoma statute with that of other states (page 33) stated:

> "A comparison of these various and diverse statutory provisions and adjudications discloses the fact that our statute is different from nearly all of them, except the statute of Kansas from which it was adopted.
>
> • • • • • • • •
>
> "We should look to the legislation of Kansas on this subject, prior to and at the time of our legislature adopting it, as well as any adjudications on the subject by the highest courts of that state."

The court, on pages 34-35, quotes in full Sec. 199, Compiled Laws of Kansas of 1862, the material parts of which are as follows:

> "The plaintiff in a civil action for the recovery of money, may, at or after the commencement thereof have attachment against the property of the defendant and upon the grounds herein stated setting forth nine different grounds. *First*, when the defendant is a foreign corporation or non-resident of the state.
>
> • • • • • • • •
>
> "*Ninth*, fraudulently contracted the debt or incurred the liability for which the suit is about to be or has been brought.
>
> "But an attachment shall not be granted on the ground that the defendant is a foreign corporation, or

non-resident of this Territory for any claim other than a debt or demand arising upon contract, judgment or decree."

And quotes (pages 34-35) extensively from *Treadway v. Ryan, et al.*, 3 Kan. 437, wherein the Supreme Court of Kansas in 1866 construed the Kansas statute as follows:

"Section 199 of the Code of Civil Procedure, authorizes an attachment in any civil action for the recovery of money upon any one of nine enumerated grounds with but a single limitation, *viz.*: If the ground upon which the attachment is asked be the non-residency of the defendant, it must appear that the claim upon which the suit is sought to be maintaind is a 'debt or demand arising upon contract, judgment or decree.'

* * * * * * * *

"He may have an attachment upon the establishing of any of the grounds mentioned in Section 199, except that of the non-residency of the defendant. *With reference to the other eight grounds it will be sufficient if the proceedings be a 'civil action for the recovery of moneys,'* but in regard to the one mentioned, the proceedings must not only be a 'civil action,' but must be predicated upon a 'demand arising upon contract, judgment, or decree'." (Italics ours.)

And refers to (page 36) the revision of the Kansas statute in 1868 which was carried into the revised laws as Sec. 190, and is quoted in full. The only change being the last clause of the statute *supra* was amended to read, "unless the cause of action arose wholly within the limits of this state, which fact must be established on the trial." The court then quotes in full Sec. 190 of the Kansas laws of 1870 as amended, there being no material change except the first ground of attachment was amended to read as follows:

"*First*, when the defendant, or one of several de-

fendants, is a foreign corporation or a non-resident of this state: (but no order of attachment shall be issued on the ground or grounds in this clause stated for any claim other than a debt or demand arising upon contract, judgment or decree, unless the cause of action arose wholly within the limits of this state, which fact must be established on the trial.)"

And the ninth ground was amended to read as follows:

> "*Ninth,* fraudulently contracted the debt, or *fraudulently* incurred the liability *or obligations* for which suit is about to be or has been brought." (Italics ours, being the amendment.)

And quotes (page 37) from *Gillespie* v. *Lowell,* 7 Kan. 419 (decided 1871), as follows:

> "Under Section 190 of the Civil Code, Laws of 1870, p. 171, the plaintiff may have an attachment in every 'civil action for the recovery of money'."

The Kansas statute of 1870 on attachment was not amended when adopted by Oklahoma in 1893. The Oklahoma court (*Kidd* v. *Syfert,* 11 Okl. 32, *supra*) after reviewing the history of the Oklahoma statute and quoting the Kansas statutes of 1862-1868-1870 and Kansas decision as above stated, holding the statute authorized attachment "in every civil action for the recovery of money" stated, pages 38-39, as follows:

> "What a civil action is, is defined by statute, and if such action is for the recovery of money, then the plaintiff in such action is entitled to an attachment whenever one of the grounds specified for an attachment exists, *and there is no room under the terms of the statute, for the courts to limit the character of the action in which attachments may issue.* Why say an attachment may issue in an action arising out of contract and

that it may not issue in an action to recover damages for a wrong, when both are civil actions for the recovery of money only? The legislature has made the provisions too clear, certain and positive to admit of any such distinction."

As to character of action, the court stated:

"If the action is one for the recovery of money, and any cause for attachment exists, except the first, *then there is no limitation whatever upon the right to an attachment: the character of the action, whether arising out of contract or tort is not material.* But the first cause for attachment contains one limitation."

In *Hendrickson* v. *Brown,* 11 Okl. 41, (decided 1901) being an action to set aside a deed and recover a money judgment, the trial court discharged the attachment upon the ground the same was not an action for the recovery of money but one for the rescission of a contract, and one in which plaintiff is not entitled to an attachment.

Syllabus one reads as follows:

"*Attachment—Right to.* The plaintiff in a civil action for the recovery of money may have an attachment upon the grounds set forth in the statute, and the fact that some specific relief is necessary, or that the action is one that formerly would have been a suit in equity, will not defeat the right to an attachment, if the action is one in which, in addition to such specific relief, a money judgment may also be rendered."

As to the character of the action, the court, pages 42-43, stated:

"It is immaterial whether it be an action on contract, an action to recover damages for a tort or an action for equitable relief. If the facts stated will entitle the plaintiff to a personal money judgment, then he comes within the statutory provisions entitling him

to the remedy by attachment. *The legislature has not seen fit to place any limitation upon the character of action or the relief or remedy sought, except that it must be an action for the 'recovery of money,' and the courts have no power to further limit or nullify the plain and unambiguous provisions of the statute."* (Italics ours.)

The decisions of *Kidd* v. *Syfert, supra,* and *Hendrickson* v. *Brown, supra,* were declared in 1901 and have stood unchallenged for more than 50 years as the law of Oklahoma without being overruled or criticized, although various legislatures have convened, said statute has never been amended. Therefore, it is not improper to say the law making power of Oklahoma has adopted the judicial construction given to the statute by the Supreme Court of Oklahoma Territory in 1901 in the above decisions.

In spite of the plain and unambiguous language of the Oklhaoma court holding, if any grounds existed, except the first, there was no limitation upon the right of attachment and the character of the action was immaterial, the Circuit Court of Appeals has in direct conflict therewith held the character of the action was material and the right of attachment existed in only certain character of tort actions.

***(B)*** **The holding of the Circuit Court of Appeals that the attachment proceedings are void is in conflict with the following decisions: *Thwing* v. *Winkler,* 13 Okl. 643, 75 Pac. 1126; *Central Loan & Trust Co.* v. *Campbell Commission Co.,* 173 U. S. 84, 19 S. Ct. 346, 43 L. ed. 623.**

The procedural detail for securing attachment in Oklahoma is well defined by statute and settled by the Oklahoma decisions as follows:

(1) Filing a petition for the recovery of money as provided by Sec. 1151, Title 12, *supra;*

(2) By filing an affidavit setting forth in the language of the statute one of the statutory grounds for attachment as provided by Sec. 1152, Title 12, copied in full herein as Exhibit "B";

(3) That upon filing said affidavit of attachment the clerk in his ministerial capacity issues the writ.

Section 1152, *supra*, of the Oklahoma statute was construed by the Supreme Court of Oklahoma in *Thwing* v. *Winkler*, 13 Okl. 643, 75 Pac. 1126, wherein the plaintiff procured an attachment upon the ninth ground of the statute said affidavit being:

"fraudulently contracted the debt and incurred the liability and obligation for which the above named suit has been brought, and has failed to pay the price and value of said articles and things delivered, which, by said contract, he was bound to pay upon delivery."

The affidavit in the case at bar as grounds for attachment reads as follows:

"That the defendants fraudulently incurred the liability and obligations for which this action is brought." (R. 14-15)

The court held the affidavit sufficient and in syllabus one stated:

"*Attachment — Statute Construed.* A positive statement is an affidavit of attachment in the language of the statute that the plaintiff's debt was fraudulently contracted, or that he fraudulently incurred the liability or obligation for which the suit had been brought, is sufficient under the statute to authorize the issuance of an attachment."

This Court in *Central Loan and Trust Co.* v. *Campbell Commission Co.*, 173 U. S. 84, 19 S. Ct. 346, 43 L. ed. 623, reversing the Territorial Supreme Court of Oklahoma 5

Okl. 396 in considering what is now Sec. 1152, Title 12, *supra,* regarding the affidavit of attachment and the requirements and sufficiency thereof in syllabus five stated as follows:

> "5. Under statutes containing particular requirements as to what shall be stated in an affidavit for attachment, so that the grounds of attachment may be alleged in the language of the statute, the authority to grant the writ is ministerial, and not judicial, in its nature."

The action being for the recovery of money and the affidavit of attachment being regular upon its face and contains all the prerequisites required by Sec. 1152, Title 12, *supra,* is sufficient to authorize the issuing of the writ of attachment and the attachment proceedings are not void. The Circuit Court of Appeals erred in holding the attachment void.

***(C)*** **The holding of the Circuit Court of Appeals the attachment procured upon the ninth ground is limited to certain tort actions is in conflict with the construction placed thereon by the Supreme Court of Kansas prior to the statute being adopted by Oklahoma in *Treadway* v. *Ryan,* 3 Kan. 437; *Gillespie* v. *Lowell,* 7 Kan. 419; *Stone* v. *Boone,* 24 Kan. 337, and *Cain* v. *Perfect,* 89 Kan. 361, 131 Pac. 574, rendered after the adoption of said statute by Oklahoma.**

The Supreme Court of Kansas in *Treadway* v. *Ryan, et al.,* 3 Kan. 437, construed the Kansas statute heretofore referred to, Sec. 199 of the Statutes of 1862, and in syllabus two held as follows:

> "With reference to the other grounds for an attachment it will be sufficient if the proceeding be a 'civil action for the recovery of money,' and, therefore,

on such grounds an attachment might have been sustained, if any of such grounds existed."

The Kansas Legislature amended said section of the statute and the same was carried forth in the Kansas Statutes of 1870 as Sec. 190 and the ninth ground of said statute was amended to read:

> "Fraudulently contracted the debt, or *fraudulently* incurred the liability or *obligations* for which the suit is about to be or has been brought." (Italics ours.)

The Supreme Court of Kansas in *Stone* v. *Boone*, 24 Kan. 337, in referring to *Treadway* v. *Ryan* and the fact that the Legislature had amended and re-enacted said statute relating to attachment as Sec. 190, Kansas Statutes of 1870, the court on page 249 stated as follows:

> "The decision of *Treadway* v. *Ryan, supra*, was declared in 1866; it has stood unchallenged for nearly fifteen years; it has been copied and referred to in various text-books as the law of this state; and in 1870 the legislature re-enacted the section of the Code of 1859 interpreted by that decision (Laws 1870, c. 87, par. 4), therefore it is not improper to say the law-making power of the state adopted the judicial construction given to the statute by the Supreme Court in 1866."

The Kansas Legislature again in 1911 amended said statute but made no change except omitting the limitation contained in the first ground of attachment, the remaining grounds remaining the same, and as amended.

The Supreme Court of Kansas in *Cain* v. *Perfect*, 89 Kan. 361, 131 Pac. 574-575, in referring to said amendment stated as follows:

> "Previous to amendment of 1911, the only limita-

tion on the right of attachment in an action for the recovery of money as far as the nature of the cause of action is concerned, was that contained in the first subdivision of the section. If the ground for attachment of defendant was a non-resident or foreign corporation, it is necessary that the cause of action should rest upon contract, judgment, or decree, unless it arose wholly within the limits of the state. The sole purpose of the amendment was to strike out this limitation."

The opinion of the Circuit Court of Appeals in limiting the right of attachment under ground nine of Section 1151, *supra,* is in conflict with the spirit and letter of the construction placed thereon by the Supreme Court of Kansas prior to its adoption by the Oklahoma Legislature.

***(D)*** **Decisions of the Oklahoma Supreme Court are controlling.**

The court below erred in holding the right of attachment was limited to certain character of tort actions, in spite of the well established rule in Oklahoma announced in *Kidd* v. *Syfert, supra; Hendrickson* v. *Brown, supra,* (1901) construing Sec. 1151, Oklahoma Statute, *supra,* holding the right of attachment in every civil action for the recovery of money was available if any grounds existed for attachment except the first, without limitation, and the character of the action is immaterial.

The rule is now well settled that except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state as declared by its legislature in a statute or by its highest court.

—*Rorick* v. *Devon Syndicate,* 307 U. S. 650, 59 S. Ct. 1041, 83 L. ed. 1529;

*Erie Railroad* v. *Tompkins,* 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817;

*Willing* v. *Binenstock,* 302 U. S. 272, 82 L. ed. 248, 58 S. Ct. 175;

*Mutual Life Insurance Co.* v. *Johnson,* 293 U. S. 335, 79 L. ed. 398, 55 S. Ct. 154;

*Marine Bank* v. *Kalt-Zimmers,* 293 U. S. 357, 79 L. ed. 427, 55 S. Ct. 226;

*Burns Mortgage Co.* v. *Fried,* 292 U. S. 487, 78 L. ed. 1380, 54 S. Ct. 813.

Applying the foregoing rule, it has been repeatedly held in actions involving attachments authorized by the statutes of a state, that the federal courts apply and enforce such remedies, adopting and following the interpretation of the statutes by the highest court of the state.

*Loewe* v. *Savings Bank,* 236 Fed. 444, aff'd 242 U. S. 357, 37 S. Ct. 172, 61 L. ed. 360;

*Perez* v. *Fernandez,* 202 U. S. 80, 25 L. ed. 954, 26 S. Ct. 561;

*Fleitas* v. *Cockren,* 101 U. S. 301, 25 L. ed. 954;

*Beach* v. *Viles,* 27 U. S. 675, 2 Peters 675;

*LaVarre* v. *International Paper Co.,* (D. C., S. C.) 37 F. (2d) 141;

*Wheeling Traction* v. *Pennsylvania Co.,* (D. C., Ohio) 1 F. (2d) 478;

*Pere Marquette Railway* v. *Western Dispatch,* (D. C., Mich.) 284 Fed. 574.

The courts below were bound by the decisions of the Supreme Court of Oklahoma in *Kidd* v. *Syfert,* 11 Okl. 32, *supra,* and *Hendrickson* v. *Brown,* 11 Okl. 41, *supra,* construing said statute and should have followed the rule laid down in said cases holding the character of tort action is immaterial, and the decision of the Supreme Court in

*Thwing* v. *Winkler,* 13 Okl. 643, holding that an affidavit of attachment being in the language of the statute was sufficient and the attachment valid.

***(E)*** **The court below in holding the right of attachment under the ninth paragraph of Section 1151, Oklahoma statute, *supra,* is limited to certain actions arising from contract or from a wrong growing out of a contract tainted with fraud, relies upon no Oklahoma decisions but cites and relies solely upon decisions from Ohio, West Virginia and Michigan, the statutes of which are not identical with the language of Oklahoma statute, *supra.***

Citing:

*Merchants Bank of Cleveland* v. *Ohio Life Ins. & Tr. Co.,* (Ohio) 1 Disn. 469;

*Ellison* v. *Bartgis,* .... W. Va. ...., 194 S. E. 344;

*Emerson* v. *Detroit Steel & Spring Co.,* 100 Mich. 127, 58 N. W. 659, 660. (R. 40)

In *Merchants Bank of Cleveland* v. *Ohio Life Ins. & Tr. Co., supra* (decided 1857), the court stated:

> "Within the statute authorizing an attachment where defendant has 'fraudulently contracted the debt or incurred the obligation * * *' the obligation must arise from contract."

The Ohio Legislature apparently not satisfied with the above construction placed upon the statute by the court, limiting the right of attachment to character of actions arising from contract, amended said statute. See *Sturdevant* v. *Tuttle,* 22 Ohio St. 111 (decided 1871), wherein the court stated:

> "It is possible that the word 'fraudulently,' standing alone, as it did, in the original act, confined its operation to cases sounding in contract, as the term implies confidence and deception."

That the Oklahoma court did not construe or interpret the decisions of the Ohio court as limiting the right of attachment to obligations arising from contract is supported by the fact the Court in *Hendrickson* v. *Brown,* 11 Okl. 44-45, quoted from *Ward* v. *Howard,* 12 Ohio St. 158 (decided 1861), as follows:

> "An attachment is allowed to the plaintiff in a civil action for the recovery of money. * * * The conclusion follows, that if the action be for the recovery of money, though not for a debt or demand arising upon contract, judgment or decree, an attachment may be obtained. This conclusion is strengthened by the consideration that the next section of the statute provides that the affidavit for an attachment among other things must show the nature of the plaintiff's claim, that it is just, and 'the amount which the affiant believes the plaintiff ought to recover.'
>
> "It is obvious that an intention is manifested to extend the remedy by attachment, and that in no stinted measure."

The above decisions are clear that the character of action whether arising upon contract or tort is not material under the Ohio statute nor was it material when the Oklahoma court decided *Hendrickson* v. *Brown, supra.*

In *Ellison* v. *Bartgis,* West Virginia, *supra,* and *Emerson* v. *Detroit Steel & Spring Co.,* Michigan, *supra,* the above opinions reflect the grounds of attachment in said statutes were practically identical and read as follows:

> "Fraudulently contracted the debt or incurred the liability for which the action or suit is about to be or is brought."

The Oklahoma statute when construed by the Supreme Court of Oklahoma in *Kidd* v. *Syfert,* 11 Okl. 32, *supra,* and *Hendrickson* v. *Brown,* 11 Okl. 41, *supra,* reads as follows:

"Fraudulently contracted the debt, or *fraudulently* incurred the liability *or obligations* for which suit is about to be or has been brought." (Italics ours.)

The above decisions of other states are not controlling over the plain and unambiguous language employed in *Kidd* v. *Syfert, supra,* and *Hendrickson* v. *Brown, supra,* and the lower court erred in so holding.

***(F)*** **The opinion is in conflict with the spirit and letter of the construction placed upon a similar statute by the Seventh Circuit Court of Appeals.**

The 7th Circuit Court of Appeals in *Shedd* v. *Calumet Construction Company,* 270 Fed. 942, construed the Indiana statute which authorized attachments in actions for the recovery of money and held attachments were authorized in tort actions for damages, stating:

"The right of attachment exists by statute, and concededly, where the statute does not clearly authorize attachment in actions *ex delicto,* the right does not exist. In some of the states, where, as in Indiana, the right of attachment is given in actions 'for the recovery of money,' it has been held applicable to actions in tort as well as in contract."

Citing amongst other cases *Kidd* v. *Syfert,* 11 Okl. 32, 65 Pac. 931, and *Sturdevant* v. *Tuttle,* 22 Ohio St. 111, stating:

"The statutory expression, 'for the recovery of money,' is surely broad enough to include such action, which manifestly have for their sole purpose the recovery of money. In the absence of any limitation by construction of the Indiana courts, we do not, under the circumstances, feel warranted in circumscribing it as contended for, and we therefore hold that the alleged error predicated on the denial of the motion to quash the attachment is not well grounded."

### *Conclusion.*

We thus have three different constructions of Sec. 1151, Title 12, *supra,* Oklahoma Statutes of 1951, the Oklahoma courts construing said statutes as follows:

> "If the action is one for the recovery of money, where any cause of action exists, except the first, then there is no limitation whatever upon the right to an attachment; the character of the action whether arising out of contract or tort is not material."
>
> —*Kidd* v. *Syfert,* 11 Okl. 32, *supra;*
>
> *Hendrickson* v. *Brown,* 11 Okl. 41, *supra.*

The Federal District Court of the Northern District of Oklahoma held:

> "12 Oklahoma Statutes 1951, Section 1151, Subdivision 9, furnishes no ground for the attachment issued herein, since plaintiff's cause of action sounds in tort, and the statute is limited to actions *ex contractu.*" (R. 25)

The Circuit Court of Appeals affirmed said judgment holding:

> "Oklahoma statutes undoubtedly cover certain tort actions but it does not cover the claim in the instant case * * * we are of the opinion that paragraph 9, *supra,* does not embrace an action for conspiracy, nor for the fraudulent and malicious dissemination of false, misleading or untrue statements." (R. 39-40)

Because of the question presented in placing a construction upon an important statute of Oklahoma, the case is of such wide general interest, and to prevent a confused and chaotic condition, this Court should exercise its supervisory powers to eliminate the obvious conflict between the decision of the court below and the decisions of the Su-

preme Court of Oklahoma, so that the law may be authoritatively defined and the erroneous result below corrected.

We respectfully submit that the attachment procured in this action could be and ought to be sustained, and that if this cause is reviewed by this Court, it should result in an order reversing the court below by (*1*) holding the attachment secured in the state court was regular upon its face and valid; (*2*) and overruling the motion to quash the service of process, and by remanding the matter to the District Court for further proceedings in accordance with law.

Respectfully submitted,

INVESTORS ROYALTY COMPANY, INC.,
*Petitioner,*

By NEAL E. MCNEILL,
*Counsel for Petitioner.*

ROGER DELL,
NEAL E. MCNEILL, JR.,
*Of Counsel.*

## *Appendix "A."*

## ATTACHMENT.

1151. *Grounds for Attachment.* The plaintiff in a civil action for the recovery of money may, at or after the commencement thereof, have an attachment against the property of the defendant, and upon the grounds herein stated:

1. When the defendant, or one of several defendants, is a foreign corporation, or a non-resident of this State, (but no order of attachment shall be issued on the ground or grounds in this clause stated for any claim other than a debt or demand arising upon contract, judgment or decree, unless the cause of action arose wholly within the limits of this State, which fact must be established on the trial):

2. When the defendant, or one of several defendants, has absconded with intention to defraud his creditors; or,

3. Has left the county of his residence to avoid the service of summons; or

4. So conceals himself that a summons cannot be served upon him; or,

5. Is about to remove his property, or a part thereof, out of the jurisdiction of the court with the intent to defraud his creditors; or,

6. Is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors; or,

7. Has property rights in action, which he conceals; or,

8. Has assigned, removed or disposed of, or is about to dispose of, his property, or a part thereof, with the intent to defraud, hinder or delay his creditors; or,

9. Fraudulently contracted the debt, or fraudulently

incurred the liability or obligation for which the suit is about to be or has been brought; or,

10. Where the damages for which the action is brought are for injuries arising from the commission of some felony or misdemeanor, or the seduction of any female; or,

11. When the debtor has failed to pay the price of value of any article or thing delivered, which by contract he was bound to pay upon delivery.

***Appendix "B."***

1152. *Attachment Affidavit.* The order of attachment shall be issued by the clerk of the court in which the action is brought, in any case mentioned in the preceding section, when there is filed in his office an affidavit of the plaintiff, his agent or attorney, showing:

First—The nature of the plaintiff's claim;

Second—That it is just;

Third—The amount which the affiant believes the plaintiff ought to recover; and

Fourth—The existence of some one of the grounds for an attachment enumerated in the preceding section.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1953.

No. 364

INVESTORS ROYALTY COMPANY, INC., A DELEWARE CORPORATION, *Petitioner,*

vs.

MARKET TREND SURVEY, INC., A CORPORATION, A. CLIFTON STEWART, AND JOHN DOE, WHOSE TRUE NAME IS UNKNOWN,

*Respondents.*

# PETITION FOR REHEARING ON ORDER DENYING WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

*To the Honorable Supreme Court of the United States:*

The petitioner respectfully shows:

Petitioner, Investors Royalty Company, a Delaware corporation, on September 21, 1953, filed its petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit to review a decision of said court, now reported 206 F. (2d) 108, holding the attachment issued in the state court was void and quashing service had by publication, which petition was by this Honorable Court denied December 7, 1953.

Your petitioner feels aggrieved by the order denying said writ and respectfully requests this Honorable Court to grant a rehearing and upon rehearing to issue said writ.

A sufficient statement of the record appears in the petition for writ of certiorari, pages 1-3. The reasons urged for allowing the writ are set forth in the petition, pages 4-5, to which reference is made and will not be restated herein except by summarizing that the proceedings arose in the state court by petitioner filing an amended petition on May 9, 1952, seeking to recover actual and exemplary damages from respondents (Pt-r. 12-14).

May 9, 1952, affidavit for attachment was filed (Pt-r. 14-15). Order of attachment issued May 9, 1952 (Pt-r. 15), and the sheriff made his return showing the attachment of certificates of respondents (Pt-r. 15-17). Affidavit for service by publication filed June 10, 1952 (Pt-r. 18-20). Notice of summons published (Pt-r. 20-21).

Respondents A. Clifton Stewart and Margaret A. Stewart July 21, 1952, filed a special appearance and motion to quash summons by publication upon seven grounds all of which were denied except the 6th ground which reads as follows:

> "6. It appears upon the face of the petition or complaint and the amendment thereto, that plaintiff's cause of action, if any it has, is an action for alleged fraud, or the commission of alleged fraudulent acts, and is not within the purview of 12 Oklahoma Statutes 1951, Section 1151, Subdivision 9."

The trial court held in conclusion 6 as follows:

> "6. 12 Oklahoma Statutes 1951, Section 1151, Subdivision 9, furnishes no ground for the attachment issued herein, since plaintiff's cause of action sounds in tort, and the statute is limited to actions *ex contractu.*" (Pt-r. 25)

And ordered and adjudged as follows:

> "1. The attachment herein is void and will not sustain publication service.

"2. The notice and service by publication herein upon defendants A. Clifton Stewart and Margaret A. Stewart is quashed, vacated, set aside and held for naught." (Pt-r. 25)

The Circuit Court of Appeals affirmed the judgment upon the sole ground that the attachment proceedings were void. 206 F. (2d) 108.

The sole and decisive question is "whether the attachment proceedings are void," as stated by counsel for respondents in presenting the motion to quash the service by publication, as follows:

"If the attachment is valid, the service is valid; and if the attachment is void, or unauthorized, then the publication service falls with it. These defendants say that the service is void because it is based upon a void and an unauthorized attachment. They make no point concerning the sufficiency of the proceedings in a technical sense, but rather in a substantive sense." (Pt-r. 27)

The grounds relied upon for rehearing on the petition for the writ are:

I.

**The attachment proceedings are in conformity with the Oklahoma Statute and are not void under the decisions of the Supreme Court of Oklahoma construing said Statute and the construction placed upon said Statute is binding upon the Federal Courts upon removal.**

It is a well settled principle of law that attachment proceedings and the right of attachment are creatures of the statute, and the validity of attachment proceedings depends upon the construction the courts of last resort of the state has placed upon said statutes.

The Oklahoma statute authorizing the issuance of attachment is Chapter 21, Title 12, O. S. 1951, Sections 1151-1160. Section 1151 of Title 12, *supra*, defines the actions in which an attachment may be had and the 11 grounds for attachment and is copied in full as Appendix "A" to our writ of certiorari on pages 23-24 to which reference is made. The first paragraph thereof reads as follows:

> "The plaintiff in a civil action for the recovery of money, may, at or after the commencement thereof have attachment against the property of the defendant upon the grounds herein stated."

It was conceded by the respondents and the trial Federal Court and the Circuit Court of Appeals that plaintiff's cause of action was for damages and a civil action within the meaning of the above statute and sounds in tort.

The above statute was first construed by the Supreme Court of Oklahoma in *Kidd* v. *Syfert*, 11 Okl. 32-39, 65 Pac. 931, being a tort action to recover damages for property negligently destroyed by fire, the court stating, "This action is one for damages sounding in tort."

In determining whether the above paragraph of the statute was sufficiently broad to cover tort actions the court reviewed the history of the statute stating the Oklahoma territorial legislature had adopted it from the State of Kansas and reviewed the Kansas decisions and after reviewing the Kansas decisions stated:

> "Why say an attachment may issue in an action arising out of contract and it may not issue in an action to recover damages for a wrong, when both are civil actions for the recovery of money. The legislature has made the provisions too clear, certain and positive to admit of any such distinction." (11 Okl. 39.)

The court further stated:

> "If the action is one for the recovery of money and any cause for attachment exists, except the first, then there is no limitation whatever upon the right to an attachment: *the character of the action, whether arising out of contract or tort is not material.*" (Italics ours.)

The Territorial Supreme Court of Oklahoma at the same term of court in 1901 decided the case of *T. G. Hendrickson* v. *Warren H. Brown*, 11 Okl. 41-45, 65 Pac. 935, being an action to set aside a deed upon the grounds of fraud and recover a sum of money, the court in construing the above paragraph of the statute (11 Okl. 43) stated as follows:

> "*It is immaterial whether it be an action on contract, an action to recover damages for a tort or an action for equitable relief.* If the facts stated will entitle the plaintiff to a personal money judgment, then he comes within the statutory provisions entitling him to the remedy by attachment. The legislature has not seen fit to place any limitation upon the character of the action or the relief or remedy sought, *except that it must be an action for the 'recovery of money,'* and *the courts have no power to further limit or nullify the plain and unambiguous provisions of the statute.*" (Italics ours.)

The court in said opinion (11 Okl. 44-45) quoted extensively from the case of *Ward & Co.* v. *Howard, et al.*, 12 Ohio St. 1151, in part as follows:

> "The conclusion follows, that if the action be for the recovery of money, though not for a debt or demand arising upon contract, judgment or decree, attachment may be obtained. This conclusion is strengthened by the consideration that the next section of the statute provides that the affidavit for an attachment among other things must show the nature of the plain-

> tiff's claim, that it is just, and 'the amount which the affiant believes the plaintiff ought to recover'."

The next section of the Ohio statute above referred to is substantially the language of Section 1152, Title 12, O. S. 1951, of the Oklahoma statutes which was in force and effect at the time and copied in full in our petition for writ of certiorari herein on page 24 as Appendix "B."

The Oklahoma court further quoted from the Ohio court as follows:

> "It is obvious that an intention is manifested to extend the remedy by attachment, and that in no stinted measure."

It is significant that in both *Kidd* v. *Syfert, supra,* and *Hendrickson* v. *Brown, supra,* the trial court had discharged the attachment and the Territorial Supreme Court reversed the judgment of the trial court and neither of these decisions has ever been criticized or modified for more than 50 years nor has the legislature ever deemed it expedient to amend the statute on attachment.

The Oklahoma court in construing the statute has held, in plain and unambiguous language:

> "If the action is a civil action for the recovery of money, the character of action whether on contract or for *tort was immaterial.*" (Italics ours.)

The Circuit Court of Appeals (206 F. (2d) 110) in holding,

> "The Oklahoma Statute undoubtedly covers *certain tort* actions but it does not cover the claim in the instant case, unless the claim falls within the purview of paragraph 9, *supra,*"

is subject to no other construction than the right of attach-

ment under the above Oklahoma statute is limited, to certain character of tort actions and is in direct conflict with the holding of the Supreme Court of Oklahoma, which in positive language holds, the character of action is immaterial.

II.

**The action being a civil action for the recovery of money and the affidavit for attachment setting forth the grounds of the Statute in the language of the Ninth Paragraph of Section 1151, Title 12, *supra*, the attachment is valid and not void.**

It must be apparent the lower Federal Court and the Circuit Court of Appeals failed to distinguish between the right of attachment granted to the plaintiff in a civil action for the recovery of money as provided in the first paragraph of said Section 1151, Title 12, *supra*, and the various grounds authorizing the writ which must be set forth in the affidavit for attachment as provided in Section 1152, Title 12, *supra*.

Section 1152, Title 12, is copied in full and made a part of our petition for the writ marked as Appendix "B," page 24 of the petition. The Supreme Court of Oklahoma construed said section of the statute in *Twain* v. *Winkler*, 13 Okl. 643, 75 Pac. 1126, wherein the plaintiff procured an attachment upon the 9th ground of Section 1151, the same ground upon which the petitioner in this action sought the attachment. The attachment in said case read as follows:

> "* * * fraudulently contracted the debt and incurred the liability and obligation for which the above named suit has been brought, and has failed to pay the price and value of said articles and things delivered, which, by said contract, he was bound to pay upon delivery."

The affidavit in the instant case being in the language of paragraph 9 reads as follows:

> "That the defendants fraudulently incurred the liability and obligations for which this action is brought." (R. 14-15)

In *Twain* v. *Winkler,* 13 Okl. 643, 75 Pac. 1126, the defendant moved to dissolve the attachment "because the affidavit of attachment was insufficient." The Court in passing upon that question (13 Okl. 645) stated as follows:

> "Section 190 of our civil code provides that the plaintiff in a civil action for the recovery of money may, at or after the commencement thereof, have an attachment against the property of the defendant upon the ground, among other things, that the defendant 'fraudulently contracted the debt or fraudulently incurred the liability or obligation for which suit is about to be or has been brought.'
>
> "The affidavit of attachment is sworn to positively, and is in the language of the statute, and hence is sufficient, in form, to authorize the issuance of an attachment."

This Court in *Central Loan and Trust Co.* v. *Campbell Commission Co.,* 173 U. S. 84, 19 S. Ct. 346, 43 L. ed. 623, reversing the Territorial Supreme Court of Oklahoma, 5 Okl. 396, in considering what is now Sec. 1152, Title 12, *supra,* regarding the affidavit of attachment and the requirements and sufficiency thereof in syllabus five stated as follows:

> "5. Under statutes containing particular requirements as to what shall be stated in an affidavit for attachment, so that the grounds of attachment may be alleged in the language of the statute, the authority to grant the writ is ministerial, and not judicial, in its nature."

The action being for the recovery of money and the affidavit of attachment being regular upon its face and contains all the prerequisites required by Sec. 1152, Title 12, *supra*, is sufficient to authorize the issuing of the writ of attachment and the attachment proceedings are not void. The Circuit Court of Appeals erred in holding the attachment void.

III.

**The attachment proceedings being regular upon their face the attack of respondents in the motion to quash service of summons constitutes a collateral attack upon the Oklahoma decisions and of this Court.**

The Oklahoma statute providing proper procedure for discharge of property which has been wrongfully attached, Section 1241, Title 12, Statutes of 1951, reads as follows:

> "The defendant may at any time before reasonable notice to the plaintiff move to discharge an attachment as a whole or a part of the property attached."

This statute has been construed by the Supreme Court of Oklahoma on numerous occasions and held the proper procedure for discharging attachment or discharge of property which has been wrongfully attached is by motion. See *McComb* v. *Watt*, 39 Okl. 412, 135 Pac. 361; *Ballew* v. *Young*, 24 Okl. 182, 103 Pac. 623; *Price* v. *Clement*, 187 Okl. 304, 102 Pac. 595; *Millus* v. *Lowry Bros.*, 63 Okl. 261, 164 Pac. 663.

The defendants do not attack the attachment proceedings in the manner by direct attack but seek indirectly to attack the same in a motion to quash the service of summons upon the ground the attachment is void. This consti-

tutes a collateral attack as defined in *Porter* v. *Hansen*, 190 Okl. 420, 124 P. (2d) 391, as follows:

> "A 'collateral attack' on a judicial proceeding is an attempt to avoid, defeat, or evade it, or to deny its force and effect in some incidental proceeding not provided by law for the express purpose of attacking it."

See also, *Mid-Continent Pipe Line Co.* v. *Seminole County Excise Board*, 194 Okl. 40, 146 P. (2d) 996; *Shefts* v. *Oklahoma County*, 192 Okl. 483, 137 P. (2d) 585.

This Court in *Voorhees* v. *Jackson*, 10 Pet. (U. S.) 449, 9 L. ed. 490, being a proceeding to recover land sold under attachment where the party did not appear and attack the attachment as void, stated:

> "Those proceedings were brought before the court collaterally, and are by no means subject to all the exceptions which might be taken on a direct appeal. They may well be considered judicial proceedings; they were commenced in a court of justice; carried on under the supervising power of the court, and to receive its final ratification. The general and well settled rule of law in such cases is that when the proceedings are collaterally drawn in question, and it appears on the face of them that the subject-matter was within the jurisdiction of the court, they are voidable only."

The Court further stated:

> "If there is a total want of jurisdiction, the proceedings are void and a mere nullity, and confer no right and afford no justification, and may be rejected when collaterally drawn in question."

The respondents, having filed a motion to quash service by publication upon the grounds the attachment proceedings are void, have thus attacked said proceedings collaterally.

## IV.

**Decisions of Oklahoma Supreme Court Are Controlling.**

It has been repeatedly held in actions involving attachments authorized by the statutes of a state, that the Federal Courts apply and enforce such remedies, adopting and following the interpretation of the statutes by the highest court of the state.

—*Loewe* v. *Savings Bank,* 236 Fed. 444, affd. 242 U. S. 357, 37 S. Ct. 172, 61 L. ed. 360;

*Perez* v. *Fernandez,* 202 U. S. 80, 25 L. ed. 954, 26 S. Ct. 561;

*Fleitas* v. *Cochren,* 101 U. S. 675, 2 Peters 675;

*LaVarre* v. *International Paper Co.,* (D. C., S. C.) 37 F. (2d) 141;

*Wheeling Traction* v. *Pennsylvania Co.,* (D. C., Ohio) 1 F. (2d) 478;

*Pere Marquette Railway* v. *Western Dispatch,* (D. C., Mich.) 284 Fed. 574;

See Rule 64, Federal Rules of Civil Procedure.

### *Conclusion.*

The fact that the Circuit Court of Appeals has placed a construction upon the statute of Oklahoma involving the law of attachment, the case is of such wide general interest, and to prevent a confused and chaotic condition, this Court should exercise its supervisory powers to eliminate the obvious conflict between the decision of the court below and the decisions of the Supreme Court of Oklahoma which have been adhered to and followed for 50 years, so that the law may be authoritatively defined and the erroneous result below corrected.

We respectfully submit that the attachment procured

in this action could be and ought to be sustained, and that if this cause is reviewed by this Court, it should result in an order reversing the court below by (*1*) holding the attachment secured in the state court was regular upon its face and valid; (*2*) and overruling the motion to quash the service of process, and by remanding the matter to the District Court for further proceedings in accordance with law.

Respectfully submitted,

INVESTORS ROYALTY COMPANY, INC.,
*Petitioner,*

By NEAL E. MCNEILL,
*Counsel for Petitioner.*

ROGER DELL,
NEAL E. MCNEILL, JR.,
*Of Counsel.*

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## CERTIFICATE.

I, Neal E. McNeill, one of the attorneys for petitioner, do hereby certify that I am familiar with the contents of the above and foregoing petition for rehearing; that I verily believe that said petition is meritorious and is not vexatious and is not filed for purposes of delay, but in order that substantial justice may be had and done. I further certify that the petition is restricted to the grounds above specified.

NEAL E. MCNEILL,
*Attorney for Petitioner.*

Tulsa, Oklahoma,
December 17, 1953.